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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 TRIA BEAUTY, INC.,
18 Plaintiff,

19 vs.

20 RADIANCY, INC.,
Defendant.

21 RADIANCY, INC.,
22 Counterclaim Plaintiff,
vs.

23 TRIA BEAUTY, INC.,
24 Counterclaim Defendant,
and

25 KIMBERLY KARDASHIAN,
26 Counterclaim Defendant.

CASE NO. CV-10-5030 (RS) (NJV)

**RADIANCY, INC.'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO TRIA BEAUTY
INC.'S MOTION TO STRIKE
RADIANCY'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: June 7, 2012
Time: 1:30PM
Ctm: 3

Honorable Judge Richard Seeborg

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant-Counterclaimant Radiancy, Inc. (“Radiancy”) respectfully submits this memorandum of points and authorities in opposition to TRIA Beauty, Inc.’s (“TRIA”) motion to strike Radiancy’s motion for partial summary judgment on TRIA’s damages claims (the “Motion to Strike”).

PRELIMINARY STATEMENT

TRIA’s Motion to Strike is yet another example of TRIA’s attempt to paint Radiancy as a “bad actor” while refusing to acknowledge any responsibility for the significant role TRIA itself has played in this most recent scheduling dispute. However, looking beyond the numerous factual distortions and omissions on which TRIA’s Motion relies, one thing becomes crystal clear: TRIA has not presented a single, justifiable ground for striking Radiancy’s motion for partial summary judgment dismissing TRIA’s damages claims (the “Damages Motion”). Most notably, TRIA has not offered a single reason why it had been or would be prejudiced by having to respond to Radiancy’s summary judgment motion at this time. Accordingly, TRIA’s Motion to Strike should be denied.

First, and perhaps most disturbing, TRIA falsely accuses Radiancy of “fail[ing] to disclose to the Court that the damages expert reports were delayed because *Radiancy* had, for months, stalled in producing its core financial information to TRIA.” Motion to Strike at 1 (emphasis in original). This statement is as outrageous as it is utterly inaccurate. Radiancy has always been forthright – with TRIA, and with this Court – about the fact that, despite its diligent efforts, Radiancy’s ability to produce its financial information was delayed by the fact that Radiancy did not, in the ordinary course of business, break out its financials in the precise format that TRIA demanded.¹ Indeed, Radiancy explicitly disclosed this fact to the Court in its Motion for Relief from the Case Management Scheduling Order (the “Motion for Relief”) (*see* Dk. 107 at 6:4-12)

¹ Radiancy produced its financial information in an Excel spreadsheet format that greatly simplified the work needed to be done by TRIA’s damages expert to determine Radiancy’s profits.

1 and in the Declaration of Victoria L. Loughery (the “March 1st Declaration”), which was filed in
2 support of that motion (Dk. 105 ¶¶ 38-41).²

3 Moreover, contrary to TRIA’s contention, Radiancy never stated or implied that TRIA’s
4 expert report was “untimely” – Radiancy merely stated that it had not received the report in
5 sufficient time to prepare a summary judgment motion on damages prior to the April 5th deadline.
6 Such statement is neither false nor misleading. The Scheduling Order (signed by the Court just 3
7 days before the parties’ Conference) called for TRIA to serve its damages expert report on March
8 30th, less than a week before the April 5th deadline for dispositive motions – clearly not enough
9 time for Radiancy to conduct an analysis of TRIA’s damages report and prepare a summary
10 judgment motion.³

11 Notwithstanding the above, the fact is that TRIA does bear some of the responsibility for
12 the delay in the parties’ exchange of damages expert reports. TRIA’s Motion to Strike
13 hypocritically highlights the fact that Radiancy took over a year to produce its financial
14 information (Motion to Strike at 2:10), while conveniently ignoring the fact that TRIA also took
15 over a year to produce its financial information, much of which is the focus of Radiancy’s
16 Damages Motion. Indeed, although Radiancy first requested TRIA’s financial information in
17 December 2010, TRIA did not make its initial production of such information until January 11,
18 2012. Loughery Decl. Ex. 5. Then, on February 9th, TRIA informed Radiancy that its production
19 of financial information was incomplete and that the revised production might not be ready in time
20 for the deposition of TRIA’s Rule 30(b)(6) financial witness, scheduled for four days later on
21 February 13th. Loughery Decl. ¶ 9. TRIA ultimately produced its revised financials on February
22 13th (Loughery Decl. Ex. 7) and Radiancy was unable to take the deposition. The deposition was
23
24
25

26 ² The March 1st Declaration was initially subject to a motion to file under seal, which was denied by the Court on
27 March 5, 2012. Dk. 109. A true and correct copy of the March 1st Declaration (sans exhibits) is attached as Ex. 11 to
28 the May 7, 2012 Declaration of Victoria L. Loughery (“Loughery Decl.”), filed in support of Radiancy’s Opposition.

³ Indeed, Radiancy has consistently raised the concern that the parties’ case management schedule would prejudice
Radiancy’s ability to file such motion. See Reply Brief iso Motion for Relief (Dk. 113) at 9:12-15; Dk. 122 7:27-28;
Dk. 124 at 3:15-16.

not rescheduled until April 9, 2012 (four days after the deadline for filing summary judgment motions).⁴ Loughery Decl. Ex. 13.

TRIA's numerous late productions of documents (which, in part, formed the basis of Radiancy's Motion for Relief), also delayed the filing of Radiancy's Damages Motion. As explained in the Motion for Relief (Dk. 107 at 8:8-16), it was only as a result of TRIA's belated document productions that Radiancy became aware of the importance of Danika Harrison, TRIA's current VP of eCommerce and Direct Response Marketing, and the need for her deposition. Ms. Harrison's deposition was not completed until April 18, 2012, almost two weeks after the deadline for summary judgment motions. Last, and most recently, due to some unspecified "technical issues," TRIA required a last-minute extension of time to serve its damages expert report, to which Radiancy readily consented. Goetz Decl. (Dk. 152) Ex. 14.

As is clear from Radiancy's Damages Motion, in order to analyze the potential viability of TRIA's damages claims, Radiancy needed not only TRIA's financial documents, but also the testimony from the depositions of Ms. Harrison and Mr. Dannenberg and the parties' damages expert reports. Thus, it was a series of delays by both parties, not just those attributable to Radiancy, which caused the parties' mutual need to adjust the deadlines relating to expert damages reports and discovery and which prevented Radiancy from filing its Damages Motion prior to the April 5th deadline for dispositive motions.⁵

In all events, timing alone does not justify striking Radiancy's Damages Motion – especially where, as here, Radiancy asked the Court, in advance, if it would entertain the late filing. During the parties' April 12, 2012 case management conference (the "Conference"), Radiancy's counsel explained to the Court that Radiancy was strongly considering making a motion for summary judgment on TRIA's claim for damages but that, due to the timing of the

⁴ Furthermore, TRIA originally agreed to produce TRIA's Chief Financial Officer, John Rangel, as TRIA's Rule 30(b)(6) witness for financial issues. However, on March 28, 2012, TRIA notified Radiancy that it would instead be producing Michael Dannenberg, TRIA's Manager of Financial Planning & Analysis, as its Rule 30(b)(6) witness. This necessitated Radiancy to essentially re-do its deposition preparation, and to conduct additional searches for information and documents related to Mr. Dannenberg.

⁵ Aside from the trial date, this is the only deadline that either party has not consented to modify, and, if the Court grants TRIA's Motion to Strike, would be the only extension, other than of the trial date, to be denied by the Court.

relevant expert reports, Radiancy had been unable to do so by the April 5th deadline.⁶ May 7, 2012 Declaration of Brendan J. O'Rourke ("O'Rourke Decl.") ¶¶ 14-15. Radiancy asked the Court whether, if Radiancy ultimately decided to file such motion, the Court would consider it notwithstanding the fact that the date for dispositive motions had passed. *Id.* The Court stated that it would prefer not to hear the dispositive motions "*ad seriatim*," but indicated that it would consider Radiancy's motion if, and when, it was filed. *Id.* at ¶ 18. Indeed, in closing out the Conference, the Court stated that it would see the parties again "maybe not on May 10th," (*i.e.*, the hearing date for the already-pending summary judgment motions), "but some time after that."⁷ *Id.* TRIA's counsel was present at the Conference and did not raise any objection to Radiancy's request at that time, nor to the Court's statement that it would likely adjourn the May 10th hearing date.⁸ *Id.* at ¶ 17.

Accordingly, Radiancy believed in good faith that it had obtained the Court's leave to file its Damages Motion during the April 12th Conference and that a formal motion for relief was not necessary. *Id.* at ¶ 19. Importantly, and tellingly, TRIA's Motion to Strike does not identify any prejudice resulting from the late filing of Radiancy's motion. Under these circumstances, striking Radiancy's Damages Motion on procedural grounds is clearly not warranted.

⁶ TRIA incorrectly asserts that "Radiancy's first mention of its desire to potentially file an additional motion for summary judgment on damages issues" was at the April 12th Conference. Goetz Decl. ¶ 36. Radiancy informed TRIA as early as February during a meet and confer call that Radiancy was considering filing such a motion in the event that it determined one was merited after reviewing TRIA's expert report on damages. O'Rourke Decl. ¶ 20. Radiancy had also indicated its desire to file a summary judgment motion on TRIA's damages claim in Radiancy's Reply in support of its Motion for Relief, and raised its concern that the April 5th deadline for such a motion was unrealistic in light of the fact that the parties' had neither completed fact discovery, nor even begun expert discovery. *See* Dk. 113 at 9:12-15. While the Court denied Radiancy's Motion for Relief, the Court stated that such denial "does not categorically preclude either party from seeking subsequent relief should circumstances warrant it." Dk. 114 at 1:27-2:2.

⁷ The Court has since adjourned the May 10th hearing date to June 7, 2012, so that all the dispositive motions may be heard together. The Court will also hear 1) Radiancy's motion for partial summary judgment on its affirmative claims against TRIA; and 2) Kimberly Kardashian's motion for summary judgment on Radiancy's claims against her (TRIA has joined Ms. Kardashian's Motion).

⁸ On April 13th, the day after the parties' Conference, TRIA's counsel wrote to Radiancy to complain about Radiancy having raised the possibility of filing a summary judgment motion on damages. Goetz Decl. Ex. 16. TRIA accused Radiancy of misleading the Court, despite the fact that: a) Radiancy did no such thing; b) TRIA had no objection to Radiancy's request at the time; and c) the facts that Radiancy purportedly "failed to disclose" were previously disclosed to the Court in Radiancy's Motion for Relief (Dk. 107), as well as in the April 9th joint stipulated request to modify the scheduling order (Dk. 124), which was so-ordered by the Court on April 10th (Dk. 125).

1 Last, TRIA argues that the Court should strike Radiancy's Damages Motion because it is a
 2 "thinly disguised *Daubert* motion." Motion to Strike at 1:22-23. This argument falsely
 3 characterizes Radiancy's Damages Motion, which is based on the fact that: a) TRIA's damages
 4 claim is supported solely by the damages assessments provided in TRIA's expert damages reports;
 5 and b) even assuming TRIA's expert reports constitute competent and admissible evidence, the
 6 reports utterly fail to establish that TRIA has suffered any compensable injury as a result of
 7 Radiancy's advertising. *See* Dk. 147-1. Thus, the Court does not need to rule on the admissibility
 8 of TRIA's expert reports in order to decide Radiancy's Damages Motion.⁹

9 In sum, TRIA has not articulated any justifiable reason for striking Radiancy's Damages
 10 Motion. Accordingly, Radiancy respectfully requests that TRIA's Motion to Strike be denied.

11 **COUNTER-STATEMENT OF FACTS**

12 The parties' tortured history of discovery issues and scheduling problems is fully set forth
 13 in Radiancy's Motion for Relief. Dk. 107, pages 2-6. For the sake of judicial economy, Radiancy
 14 will not repeat those details again here. However, TRIA's Motion to Strike contains a number of
 15 mischaracterizations and distortions of fact concerning the parties' exchange of financial
 16 information, which Radiancy feels compelled to address in this brief.

17 **The Parties' Production of Financial Information**

18 Radiancy first requested financial information from TRIA on December 21, 2010.
 19 Loughery Decl. Ex. 1, Nos. 32-37. Subject to certain limited objections, TRIA agreed to produce
 20 the requested information. Loughery Decl. Ex. 2, Nos. 32-37. On October 13, 2011, before
 21 receiving any documents from TRIA, Radiancy requested that TRIA produce additional financial
 22 information specifically relating to TRIA's claims for damages. Loughery Decl. Ex. 3, No. 119.
 23 TRIA objected to Radiancy's request, "on the basis that it is the subject of required expert
 24 disclosures under the Case Management Scheduling Order and is thus premature. TRIA will
 25 disclose all required information in due course, pursuant to the Order." Loughery Decl. Ex. 4, No.
 26 119.

27 _____
 28 ⁹ Radiancy's rebuttal reports do establish fatal flaws in the reports submitted by TRIA's damages experts, and
 Radiancy intends to file a motion *in limine* to limit or exclude these reports when and if it becomes necessary.

1 On January 9, 2012, TRIA indicated during a meet and confer call that it expected to
 2 produce a set of summary financial documents within the next few days, and asked when it could
 3 expect Radiancy's financial information. Loughery Decl. ¶ 6. In response, Radiancy indicated
 4 that it was working on it, and hoped to produce a set of summary financial documents within the
 5 next week. *Id.* On January 11, 2012, over a year after Radiancy made its first request for financial
 6 information, TRIA made an initial production of its financial documents. Loughery Decl. Ex. 5.

7 Almost immediately after serving its initial and (unbeknownst to Radiancy at the time)
 8 incomplete production of financial information, TRIA began accusing Radiancy of frustrating the
 9 discovery process by "delaying" its own financial production. However, prior to January 11,
 10 2012, TRIA had not complained of any "delay" in the production of Radiancy's financial
 11 information – indeed, TRIA would have hardly been in a position to do so, since TRIA had not
 12 produced its own financial information. However, in light of the fact that the cut-off date for fact
 13 discovery was fast-approaching, Radiancy responded to TRIA's concerns about the timing of
 14 Radiancy's financial production by explaining that Radiancy's production was taking longer than
 15 expected due to the fact that Radiancy did not, in the ordinary course of its business, break out its
 16 product sales by individual consumer product, or in a way that separates U.S. sales from other
 17 territories (which is how TRIA had requested that such information be presented). Loughery Decl.
 18 Ex. 6.

19 Nonetheless, and notwithstanding the fact that Radiancy had no obligation to create
 20 documents that it did not keep in the ordinary course of business, Radiancy continued to work in
 21 good faith to compile its financial information and generate a summary spreadsheet in the format
 22 TRIA had requested.¹⁰ On February 15, 2012, Radiancy notified TRIA that it was still working to
 23 generate the comprehensive financial summary that TRIA had requested, and that Radiancy would
 24 be in a position to make an initial production of financial information concerning Radiancy's sales
 25 revenues and unit quantities by product line, as well as consolidated financial information for prior
 26

27 ¹⁰ Indeed, Radiancy had explicitly objected to producing documents "to the extent that any request purports, or may
 28 be construed, to call for the creation or production of any documents not kept in the normal course of business in
 Radiancy's possession, custody, control or care." Goetz Decl. Ex. 2 at 5.

I. THE COURT SHOULD EXERCISE ITS DISCRETION TO HEAR RADIANCY'S DAMAGES MOTION BECAUSE RADIANCY ACTED IN GOOD FAITH AND TRIA WILL HAVE AN ADEQUATE OPPORTUNITY TO RESPOND TO THE DAMAGES MOTION

It is well-established that courts have discretion to consider a summary judgment motion filed after the deadline for filing dispositive motions. *See, e.g., Sunstone Behavioral Health, Inc. v. Alameda Cnty. Med. Ctr.*, 2008 U.S. Dist. LEXIS 50229, at *2, n.2 (E.D. Cal. June 18, 2008) (denying a motion to strike a summary judgment motion as untimely); *Great American Ins. Co. v. United States*, 552 F. Supp. 2d 703, 705-06 (S.D. Ohio 2008) (denying a motion to strike a summary judgment motion that was filed four months after the deadline); *Coulombe v. Total Renal Care Holdings, Inc.*, 2007 U.S. Dist. LEXIS 33381 (W.D. Wash. May 4, 2007) (denying a motion to strike as untimely a summary judgment motion filed 13 days after the dispositive motion deadline).

Courts routinely exercise discretion to hear motions filed after a scheduled deadline where, as here, the movant did not act in bad faith and the filing of the motion neither deprives the non-movant of an opportunity to respond, nor delays trial. *See Monroe v. McNairy Cnty.*, 2012 U.S. Dist. LEXIS 13894 (W.D. Tenn. Feb. 6, 2012) (discretion to consider an untimely filed summary judgment motion appropriate because "Plaintiffs had adequate opportunity to respond and . . . Defendant's late filing has not delayed the trial of this matter."); *Great American*, 552 F. Supp. 2d at 706 (considering an untimely summary judgment motion where movant did not act in bad faith and plaintiffs were not prejudiced by the delayed filing). *See generally Schmidt v. Pentair, Inc.*, 2010 U.S. Dist. LEXIS 123053, at *3 (N.D. Cal. Nov. 4, 2010) (permitting an untimely motion to strike); *KEMA, Inc. v. Koperwhats*, 2010 U.S. Dist. LEXIS 90803, at *2, n.1 (N.D. Cal. Sept. 1, 2010) (allowing an untimely motion to dismiss).

Indeed, *Great American*, cited above, is particularly on point. In *Great American*, defendant filed a motion for summary judgment over four months after the dispositive motion deadline (and a month and a half after the close of discovery). *See* 552 F. Supp. 2d at 705-06. Plaintiff moved to strike defendant's motion as untimely. However, the court denied plaintiff's motion, noting that the "[d]efendant did not act in bad faith but rather filed the motion shortly after the extended discovery deadline had passed," and that plaintiff could not demonstrate any

1 prejudice because it was able to file a response to the summary judgment motion. *Id.* at 706. In
 2 light of these facts, the Court found that, despite defendant's failure to seek relief from the
 3 scheduling order before filing its motion for summary judgment, "striking the motion is not an
 4 appropriate sanction . . . under the circumstances of this case." *Id.*

5 Radiancy, like the defendant in *Great American*, acted in good faith and filed its motion
 6 shortly after the dispositive motion deadline had passed. In fact, Radiancy filed its Damages
 7 Motion just three weeks after the dispositive motion deadline and just one week after serving its
 8 expert rebuttal report on damages. Furthermore, TRIA (like the plaintiffs in *Great American*) will
 9 have an adequate opportunity to respond to the motion and has not argued it suffered any prejudice
 10 resulting from Radiancy's filing.

11 Accordingly, under the circumstances presented here, striking Radiancy's motion is not an
 12 appropriate sanction for filing the motion after the April 5th deadline for dispositive motions.
 13 This is especially true, given the fact that: a) Radiancy sought the Court's permission to file its
 14 motion after the cut-off date; and b) TRIA's counsel had an opportunity to notify the Court of any
 15 objection to Radiancy's request during the Conference, but failed to do so.

16 **II. RADIANCY ACTED DILIGENTLY AND HAD GOOD CAUSE TO FILE THE** 17 **DAMAGES MOTION AFTER THE APRIL 5 CUT-OFF DATE**

18 As explained above (at page 4), because Radiancy understood that it had obtained leave to
 19 file the Damages Motion prior to filing, Radiancy did not file a formal motion to modify the
 20 Scheduling Order under Rule 16(b) of the Federal Rules of Civil Procedure. Thus, when
 21 determining whether to consider Radiancy's late filing, the Court should apply the discretionary
 22 standard set forth in *Great American*, rather than the standard set forth in Rule 16(b). However,
 23 even under Rule 16(b), it is clear that TRIA's Motion to Strike should be denied, and that the
 24 Court should exercise its discretion to consider Radiancy's Damages Motion on the merits.
 25 Indeed, resolving Radiancy's motion on the merits furthers the purpose of Rule 16(b), which is
 26 intended to "compress the amount of time for litigation," and "reduce the amount of resources
 27 invested in litigation." Fed. R. Civ. P. 16 advisory committee notes (1983); *Moisenko v.*
 28 *Volkswagenwerk*, 2000 U.S. Dist. LEXIS 3054, at *4 (W.D. Mich. Mar. 9, 2000).

1 **A. Radiancy Acted Diligently**

2 Federal Rule of Civil Procedure 16(b)(4) provides that a court may modify or extend a
3 discovery deadline upon a showing of good cause. Fed. R. Civ. P. 16(b)(4). *See also Johnson v.*
4 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992). The “good cause” standard
5 focuses on the diligence of the party seeking to modify a scheduling order. *See id.*

6 TRIA’s Motion to Strike cites to Radiancy’s purported lack of diligence in producing its
7 financial information as grounds for striking Radiancy’s Damages Motion. Motion to Strike at 2-
8 3. Radiancy completed its financial production less than a month after TRIA completed its own
9 financial production. To the extent that brief interval could be considered a “delay” in production,
10 the cause of the “delay” was not Radiancy’s lack of diligence, but rather Radiancy’s good faith
11 efforts to accommodate TRIA’s request that Radiancy produce such information in a format
12 contrary to the manner in which it is kept in Radiancy’s ordinary course of business. Loughery
13 Decl. Ex. 6. Furthermore, TRIA has already raised the issue of Radiancy’s purported lack of
14 diligence in producing its financial information in its Opposition to Radiancy’s Motion for Relief.
15 *See* Dk. 110 at 8. Yet, despite TRIA’s allegations, the Court found that both parties (*i.e.*,
16 including Radiancy) have worked diligently and in good faith throughout the course of the
17 litigation. Dk. 114 (emphasis added).

18 As explained above, Radiancy prepared and filed its Damages Motion at the earliest
19 opportunity and within just five business days of the completion of expert disclosures on damages
20 issues. TRIA’s damages claims rest solely on the opinions of TRIA’s experts, as Radiancy’s
21 Damages Motion explains. Thus, Radiancy needed to review TRIA’s expert opinions on
22 damages, as well as the rebuttal analysis of Radiancy’s damages expert, in order to determine
23 whether a summary judgment motion was merited. Radiancy’s expert completed its analysis on
24 April 20th (in accordance with the parties’ stipulated deadline), and Radiancy filed the Damages
25 Motion just one week later.

26 Moreover, Radiancy’s Damages Motion relies on testimony from the deposition of Danika
27 Harrison and the deposition of Michael Dannenberg (TRIA’s financial 30(b)(6) deponent).
28 Through no fault of Radiancy, both of these depositions were taken after the April 5, 2012

1 deadline for filing dispositive motions. The mere fact that, despite the parties' best efforts, the
 2 litigation has not unfolded according to TRIA's overly-optimistic timetable is not sufficient reason
 3 to strike Radiancy's Damages Motion.

4 **B. TRIA Cannot – and Does Not – Claim Any Prejudice as a Result of**
 5 **Radiancy's Filing**

6 Failure to articulate prejudice is grounds to deny a motion to strike an untimely motion.
 7 *See, e.g., Sunstone Behavioral Health*, 2008 U.S. Dist. LEXIS 50229, at *2, n.2 (considering the
 8 merits of an untimely summary judgment motion where “there [was] no evidence that [the
 9 opposing party] was prejudiced by the late filing.”); *Great American*, 552 F. Supp. 2d at 706
 10 (“Because plaintiffs have not been prejudiced by defendant’s delay in filing the Motion for
 11 Summary Judgment, the Court will consider the motion.”); *Utah v. United States*, 2005 U.S. Dist.
 12 LEXIS 37041, at *11 (D. Utah Aug. 24, 2005) (denying a motion to strike a motion for summary
 13 judgment because “the parties have had an adequate opportunity to brief the issues and the court
 14 finds no prejudice to the [party opposing the summary judgment motion] in determining the
 15 motion.”).

16 TRIA's Motion to Strike should be denied because TRIA does not even attempt to argue
 17 that it will be prejudiced should the Court decide to consider Radiancy's Damages Motion. Far
 18 from identifying any prejudice, TRIA merely states that allowing Radiancy's motion would
 19 “effectively punish[] TRIA for Radiancy's egregious delay in producing its financial discovery.”
 20 Motion to Strike at 6. Such a naked assertion is hardly sufficient to justify striking Radiancy's
 21 Damages Motion.

22 In any event, TRIA cannot possibly articulate any prejudice because TRIA had over two
 23 weeks notice of Radiancy's intention to file, and, should the Court decide to hear Radiancy's
 24 motion, TRIA will have had almost a month to prepare its Opposition (rather than the two weeks
 25 to which it would have ordinarily been entitled). Finally, consideration of Radiancy's Damages
 26
 27
 28

1 Motion (scheduled to be heard on June 7, 2012) will not require any changes to the trial date or
 2 any other dates in the scheduling order.¹¹

3 **III. RADIANCY’S DAMAGES MOTION IS NOT A *DAUBERT* MOTION**

4 Finally, TRIA erroneously argues that Radiancy’s Damages Motion is a “thinly-disguised
 5 *Daubert* motion.” Motion to Strike at 1:22. However, this argument misses the point. Radiancy’s
 6 Damages Motion does not seek to exclude TRIA’s experts; it establishes that TRIA’s “evidence”
 7 of its alleged injury (which is supported solely by its expert reports) fails as a matter of law. A
 8 district court may properly reject speculative expert opinions on summary judgment. *See Lake v.*
 9 *First Nat’l Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 24765, at *6 (N.D. Cal. Mar. 10, 2011). *See*
 10 *also Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2nd Cir. 1997) (“The court performs the same role at
 11 the summary judgment phase as at trial; an expert’s report is not a talisman against summary
 12 judgment.”). It is not necessary for Radiancy to wait until trial or the close of expert discovery to
 13 make this showing, as TRIA suggests, because TRIA has already disclosed “a complete statement
 14 of *all opinions the witness[es] will express* and the basis and reasons for them” (F.R.C.P.
 15 26(a)(2)(B) (emphasis added)), and TRIA’s “complete statement” fails to establish that TRIA
 16 suffered any damages as a result of Radiancy’s allegedly wrongful actions.¹²

17 Although *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1144 (9th Cir. 1997),
 18 cited by TRIA, states that summary judgment is not warranted if an expert’s testimony supports
 19 the nonmoving party, the case is inapplicable here, since the facts and opinions disclosed by
 20 TRIA’s experts fail to support TRIA’s claim for damages. Additionally, *Echazabal v. Chevron*
 21 *USA, Inc.*, 336 F.3d 1023 (9th Cir. 2003) is inapposite because, here, Radiancy need not rely on its
 22 own experts to make this showing – *i.e.*, contrary, to the facts in *Echazabal*, Radiancy’s motion
 23 does not depend on a battle of the experts. To the extent TRIA is arguing that its expert reports
 24 have established some triable issue of fact, such argument goes to the merits of Radiancy’s
 25 summary judgment motion. Thus, it would more appropriately be raised in TRIA’s opposition to

26 ¹¹ As the Court is aware, Radiancy continues to maintain that trial in July is not feasible. However, the instant motion
 27 will not cause further delay; rather, if successful, Radiancy’s Damages Motion would effectively narrow the issues for
 28 any upcoming trial.

¹² Radiancy intends to fully conduct expert discovery and believes that this discovery will support a *Daubert* motion,
 at a later date, to exclude TRIA’s experts’ opinions entirely.

1 Radiancy's Damages Motion, rather than as grounds for a motion to strike Radiancy's motion as
2 procedurally improper.

3 CONCLUSION

4 In sum, Radiancy should be given the opportunity to dispose of TRIA's meritless damages
5 claims before trial. Radiancy acted with good faith and diligence in filing a properly constructed
6 motion for summary judgment on TRIA's claim for damages. TRIA cannot credibly claim either
7 surprise or prejudice at Radiancy's filing, and thus it should be required to respond to the
8 Damages Motion on the merits, so that the parties (and this Court) do not have to spend time and
9 resources at trial resolving an issue that could have plainly been disposed of beforehand.¹³ See,
10 e.g., *Todd v. Stryker Corp.*, 2012 U.S. Dist. LEXIS 60953, at *6-7 (E.D. Cal. May 1, 2012)
11 ("[T]he objective of modern summary judgment practice is to promote judicial efficiency and
12 avoid costly litigation"); *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1122 (E.D.
13 Cal. 2006) (noting "the objectives of modern summary judgment practice . . . [are] . . . promoting
14 judicial efficiency and avoiding costly litigation).

15 Accordingly, for all of the foregoing reasons, Radiancy respectfully requests that TRIA's
16 Motion to Strike be denied.

17 DATED: May 7, 2012

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28 ¹³ The parties now expect trial to take 7-10 days, rather than the 5-7 days originally anticipated; this change is reflected in the parties' Joint Case Management Statement, which was filed on April 5, 2012. Dk. 122, ¶ 18.